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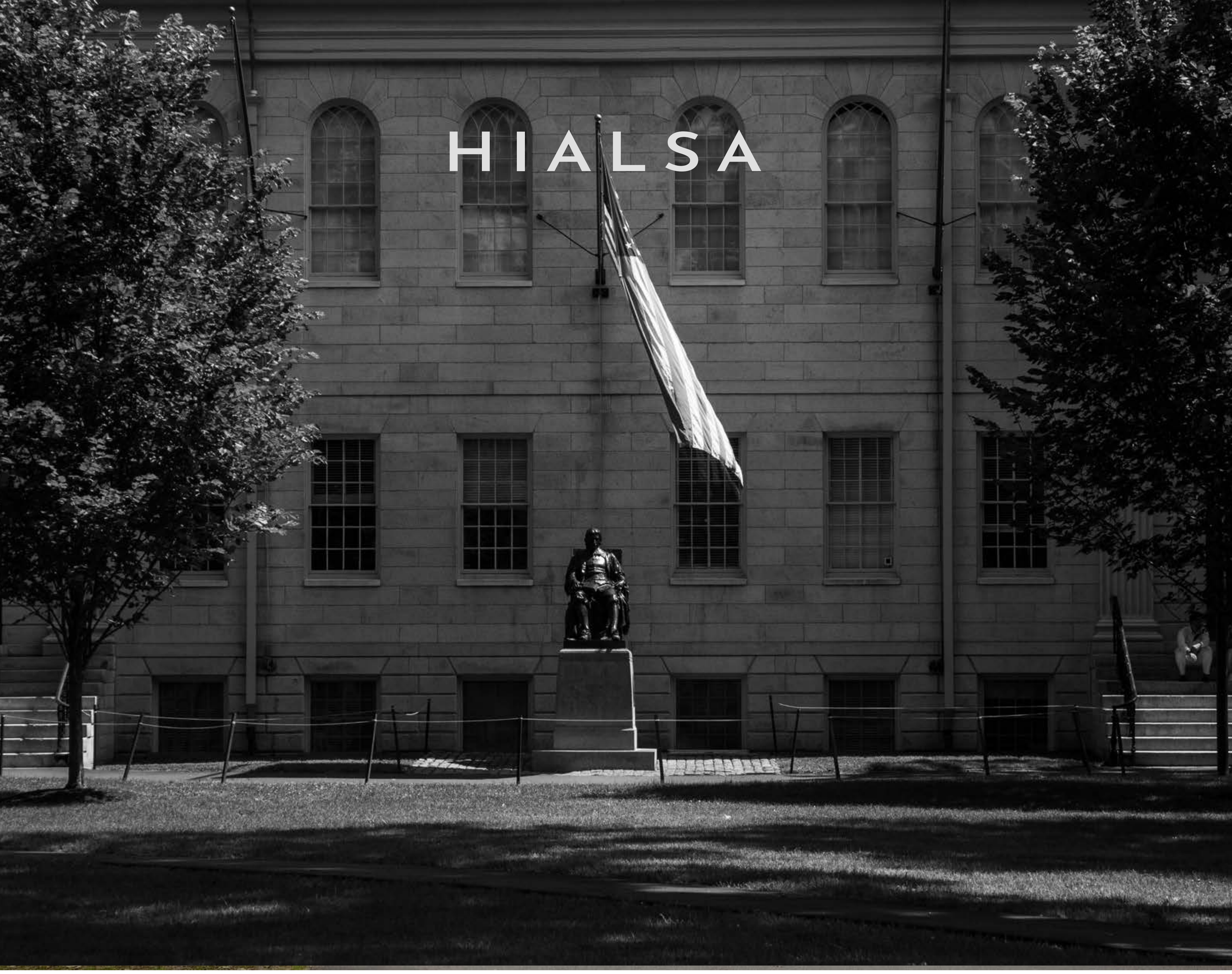

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PREPARING FOR AN INTERNATIONAL *ARBITRATION* HEARING:

A STEP-BY-STEP GUIDE

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In most international arbitration proceedings, after the written phase is closed, it is time for each party's counsel to switch gears and prepare to present their cases to the tribunal during the hearing. The hearing allows each party the opportunity to argue directly to the tribunal, to present its best evidence, and to test the other side's evidence by cross-examining witnesses. While no two hearings are exactly alike, this note outlines best practices to prepare for a hearing.

PLANNING *THE HEARING*

Ahead of every arbitration hearing, counsel and tribunals must confer and decide on several housekeeping matters that dictate how the hearing will proceed. While some of the basic features of the hearing are addressed in the initial procedural order(s) that govern the conduct of the arbitration, the details are often left to be decided at a later date, once counsel and the tribunal have a better sense of the scope of the hearing, the issues likely to be addressed, and the number of fact and expert witnesses each side has put forward, among other parameters.

The common practice is for lawyers on each side to create a checklist and meet-and-confer with one another to seek agreement on the details of the hearing. For any issues that remain disputed between the parties, the tribunal typically holds a pre-hearing conference, following which it issues a pre-hearing order that will govern the conduct of the hearing.

One of the first things for the parties to decide is the location of the hearing, which does not necessarily have to be where the arbitration is seated under the arbitration agreement. For example, an arbitration can be legally seated in Paris, France, but the hearing takes place in Washington, D.C., USA. Depending on the parties' budgets and preferences, arbitration hearings can take place at a variety of different venues, such as a law office, hotel conference room, or an institutional arbitration center.

Other important decision points include:

- **Hearing duration;**
- **Time allocation between the parties (i.e., whether to divide time based on a "chess clock method," where there is 50/50 distribution of time between the parties or to award one party additional time in light of a burden of proof issue and/or a discrepancy in the number of witnesses or experts presented or examined by the parties);**
- **Whether the hearing will be in-person, virtual, or hybrid;**
- **The start/stop times of the hearing day (which may be challenging to determine if the hearing is virtual or in hybrid format, with tribunal members, counsel, and witnesses in different time zones);**
- **The length of opening statements;**
- **The witnesses and experts that each side intends to cross-examine;**
- **The sequence of witness and expert testimony;**
- **Whether witnesses must be sequestered prior to testimony, or directed to leave the hea-ring room when other witnesses are testifying; and**
- **Whether oral closing arguments will be made at the conclusion of witness testimony.**

All of these items dictate how the hearing will proceed structurally. The vast majority of the time lawyers spend preparing for hearings, however, goes to the substance of the case they are presenting.

THE OPENING STATEMENT

Arbitral hearings typically begin with opening statements from each party. Crafting an effective opening statement is no mean feat. It is not unusual for counsel to begin preparing for the opening statement months before the hearing.

An effective opening statement is designed to persuade the Tribunal of the strengths of your case by tying together the key evidence in a digestible way, while emphasizing the major case themes and important facts and law. An effective opening statement should provide the tribunal with a roadmap of the evidence that will be presented at the hearing and how each piece of evidence fits into the larger case.

An opening statement may also anticipate what the other side will say in its opening statement and/or the opposing witnesses' testimonies. This is especially true for parties that are scheduled to present first (typically, the claimant).

An effective opening statement typically is accompanied with a visual presentation (usually PowerPoint) that follows counsel's remarks and highlights critical passages of key exhibits, testimony, or legal authorities. In preparing for a hearing, it generally makes sense to develop and refine this visual presentation alongside the outline of the oral presentation, well in advance of the hearing start date. It is also common practice (and often a requirement expressly set forth in the procedural order(s) governing the hearing) to provide the tribunal and opposing counsel courtesy copies of the opening presentation before giving the presentation.

WITNESS *EXAMINATION*

Most of the hearing time is dedicated to examining fact and expert witnesses. There is no general requirement that every witness testify orally, since written declarations and expert reports typically constitute (and substitute for) direct testimony in international arbitration. The common practice, as set forth in Article 8(1) of the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), is for each side to inform the tribunal and the other party (usually prior to the pre-hearing conference) which of the other side's witnesses they intend to cross-examine. Once the witness list is finalized, it is typical for counsel to confer to determine the sequence of the witnesses' appearances. One common approach is for the party bearing the burden of proof to present all of its witnesses first, followed by the other party's witnesses. In complex international arbitrations, however, some tribunals have favored grouping witnesses by issues. It is common for fact witnesses to testify first, followed by expert witnesses (given that the expert witnesses typically rely on the factual record to develop their opinions, and new or different facts could affect their testimony).

With the final sequencing of witnesses in hand, counsel may prepare a detailed plan for witness preparation, which includes both preparing your own witnesses for cross-examination and drafting the cross-examinations of the other side's witnesses. In the weeks leading up to the hearing, counsel typically spends significant time preparing their side's fact and expert witnesses for their participation at the hearing and cross-examination. While ethical rules regarding the scope of witness preparation may vary by jurisdiction, in jurisdictions that permit witness preparation, counsel typically should make sure that fact witnesses are familiar with what to expect (including the documents that might be presented to them on cross examination) and are aware of the introductory questions to be posed in direct examination (if any).

As a general matter, direct examinations in arbitration hearings are brief (10-15 minutes) opportunities for the witness to correct any errors in their witness statement(s) and address any new issues that have arisen since they submitted their latest witness statement, to the extent that is permitted under the tribunal's procedural orders. Preparing for cross-examination of the other side's witnesses typically includes identifying the key admissions that counsel wishes to elicit from each witness and crafting questions designed to draw out those admissions by reference to the evidentiary record.

Generally, expert witnesses give a presentation to the tribunal in lieu of a "Q&A" format direct examination. These presentations typically summarize the main issues on which the expert opines, including their rebuttal of the opposing side's expert evidence, and (like counsel argument) are often aided by visual presentations. In certain cases, the tribunal may request that experts "who have submitted Expert Reports on the same or related issues meet and confer on such issues" and "reach agreement on the issues within the scope of their Expert Reports[.]" IBA Rules, Article 5(4). The tribunal may make this request before or after the experts testify. Some arbitral tribunals have also required that opposing experts testify jointly, or answer questions together, in what is known colloquially as "hot tubbing."

CLOSING ARGUMENT (OR SIMILAR MECHANISMS)

At the end of the hearing, the parties may agree, or the tribunal may order the parties, to make closing arguments that summarize the key facts and admissions developed throughout the hearing, and represent each party's final attempt to advocate for their case at the hearing. Because closing arguments typically follow the close of expert testimony by just a half-day or day, it is incumbent on counsel to develop their closing arguments throughout the course of the hearing by identifying key testimony each day and refining their arguments to account for any questions by the tribunal or important developments during the hearing. In large or complex cases, tribunals may choose to adjourn the hearing and schedule closing statements for a later date, after they have had the chance to digest the evidence presented at the hearing and formulate final questions for counsel to answer during closing statements.

Tribunals may either ask their questions during the closing statements or share their questions with counsel ahead of the closing statements. Tribunals may also forgo closing statements altogether, especially if the parties agree to do so, and request that the parties prepare written responses to their final questions. It is also typical in international arbitration proceedings for the parties to submit post-hearing briefs, which highlight the key admissions developed throughout the hearing.

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In conclusion, while international arbitration relies heavily on written submissions that include substantial legal argument and an exhaustive presentation of the factual record, the final hearing is often where the tribunal members make up their minds. Any counsel should take seriously the duty to arrive at a final hearing not only ready to advocate, but also fully immersed in the law and the facts and prepared to answer the most difficult questions that the tribunal might pose.

With this responsibility also comes great joy, as one of the most fulfilling moments in any lawyer's career is being part of a team (which includes not only the counsel-advocates, but also witnesses, experts, clients, paralegals, and tech professionals) that presents a compelling case at a hearing.

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